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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1092

CITY OF OAKLAND, A MUNICIPAL CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 30-36) is reported in 37 F. Supp. 297. The opinion of the Circuit Court of Appeals (R. 52-65) is reported in 124 F. (2d) 959.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 14, 1942 (R. 65-66). A petition for rehearing, filed February 10, 1942, was denied February 18, 1942 (R. 66). The petition for a writ of certiorari was filed March 31, 1942.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The United States filed in a federal district court a complaint to condemn land owned by petitioner. Pursuant to the provisions of the Declaration of Taking Act, the Government contemporaneously filed a declaration of taking and deposited with the court estimated just compensation for the property. Before issuance of a summons to petitioner, the court entered a judgment declaring that title to the land had vested in the United States under the statute and directing the surrender of possession to the Government. The question is whether the judgment thus given *ex parte* was authorized by the statute, valid under the Fifth Amendment, and consonant with the applicable provisions of federal conformity statutes.

STATUTE INVOLVED

Section 1 of the Declaration of Taking Act, approved February 26, 1931, c. 307, 46 Stat. 1421 (U. S. C. title 40, sec. 258a), provides:

That in any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way

in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein,

and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

STATEMENT

On January 15, 1941, the United States filed in the District Court of the United States for the

Northern District of California, Southern Division, a complaint in condemnation against 72 acres of land in Oakland, California, against petitioner—the apparent owner—and against other persons interested in the land (R. 2-13). The complaint alleged that the Secretary of War had determined that the land in question was needed for military purposes (R. 4-5); that its use was required immediately in order that necessary improvements might be begun at the earliest practicable date (R. 5); and that simultaneously with the complaint the Secretary was filing a declaration of taking and the United States was paying into the registry of the court \$2,168,000 as the estimated just compensation (R. 12). The complaint prayed judgment condemning the land and awarding just compensation to those entitled (R. 12-13).

The declaration of taking, filed the same day, declared that it had become necessary to take the tract immediately, and stated that the sum estimated as just compensation had been deposited in the registry of the court (R. 14-16). Upon application of the United States (R. 19), the court on the same day entered judgment on the declaration of taking (R. 19-24).

The judgment recited the particulars in which it appeared to the satisfaction of the court that the requirements of the Declaration of Taking Act had been complied with (R. 20-21), declared that the fee simple title to the land had vested in the

United States upon filing of the declaration and deposit of the \$2,168,000, and stated that "the right to just compensation for the property taken * * * [had contemporaneously] vested in the persons entitled thereto, and the amount of compensation shall be ascertained and awarded in this proceeding and established by judgment herein pursuant to law" (R. 21-22). The judgment further declared that the United States was entitled to possession of the land sought to be condemned and directed the time and manner in which the United States should be given possession of the premises (R. 22-24).

Also on January 15, 1941, the court issued a summons directing petitioner to appear within thirty days and show cause why the property should not be condemned (R. 16-19). The summons was served January 16, 1941 (R. 19). On February 4, 1941, petitioner gave notice of motion to vacate the judgment on the ground that it was entered before process was served on the petitioner and an opportunity to be heard was given (R. 25-26). On March 6, 1941, the court denied the motion (R. 30). On appeal by petitioner the Circuit Court of Appeals affirmed the judgment and order (R. 65-66).

ARGUMENT

Petitioner contends (Pet. 4) that the District Court was without statutory authority to enter its judgment of January 15, 1941. The Declaration of

Taking Act, applicable in condemnation proceedings brought by the Government in any court of the United States outside the District of Columbia,¹ was enacted in order to permit the United States to acquire title to property the subject of condemnation proceedings before conclusion of those proceedings. Section 355 of the Revised Statutes² prohibits the expenditure of public money for public works until the Attorney General has certified that the United States has a good title to the site.³

¹ An earlier act, approved March 1, 1929, c. 416, sec. 10, 45 Stat. 1415, 1417 (U. S. C., title 40, sec. 370), applicable only in the District of Columbia, provides the same method for acquiring title in condemnation proceedings brought in that jurisdiction. That statute has been held to make adequate provision for just compensation, and hence not to violate the Fifth Amendment, in *Lee v. United States*, 58 F. (2d) 879 (App. D. C.), and in *Potomac Electric Power Co. v. United States*, 85 F. (2d) 243, 246-247 (App. D. C.), certiorari denied, 299 U. S. 565. Likewise, federal court decisions have ruled that the Declaration of Taking Act adequately safeguards the constitutional right to just compensation. *Hessel v. A. Smith & Co.*, 15 F. Supp. 953 (E. D. Ill.); *United States v. Eighty Acres of Land*, 26 F. Supp. 315, 322 (E. D. Ill.). Petitioner does not contend otherwise (see, e. g., Pet. 2).

² This prohibition of section 355 appears at several places in the United States Code: title 33, sec. 733; title 34, sec. 520; title 40, sec. 255; title 50, sec. 175.

³ There are some exceptions to the prohibition: (1) section 355, as amended by the Act of October 9, 1940, c. 793, 54 Stat. 1083, permits *purchase* of "low-value lands" as there defined subject to such infirmities of title as in the opinion of the Attorney General will not presently jeopardize the interests of the United States, and allows the expenditure upon such lands of limited amounts of public money; (2) the Act of

Prior to enactment of the statute of 1931, the United States generally acquired title to lands in condemnation only at the close of the proceeding, *i. e.*, after compensation had been ascertained, judgment entered, and, if appealed from, affirmed.⁴ In consequence, until condemnation proceedings ended, the United States could not make improvements upon condemned lands. Urging prompt

July 18, 1918, c. 155, sec. 5, 40 Stat. 911 (U. S. C., title 33, sec. 594), authorizes the Secretary of War to take possession of lands, etc. needed for an authorized river and harbor improvement and proceed with the public works authorized by Congress; (3) the Act of September 9, 1940, c. 717, 54 Stat. 872, 873, provides that all construction for the military establishment authorized prior to July 1, 1942, may be prosecuted prior to approval by the Attorney General of title to the required land to such extent as may be deemed advantageous by the Secretary of War.

The fact that the land in suit herein may come within exception (3), noted above, does not, of course, render inapplicable the Declaration of Taking Act; its broad purpose was obviously not limited to only those cases involving the problem of section 355.

⁴ There were state statutes under which title to condemned property could be acquired pending determination of compensation, but, except for the Secretary of War, federal officers could not proceed under these statutes because they lacked authority to commit the United States to pay an award which might possibly exceed congressional appropriations. See Act of July 18, 1918, c. 155, sec. 5, 40 Stat. 911, (U. S. C., title 33, sec. 594); Act of July 2, 1917, c. 35, 40 Stat. 241, as amended (U. S. C., title 50, sec. 171). The availability of such state laws in any case would not affect the applicability of the Declaration of Taking Act. Cf. n. 3, pp. 7, 8, *supra*.

passage of the bill which became the Declaration of Taking Act, Attorney General Mitchell wrote to the Chairman of the House of Representatives Committee on the Judiciary:

We have a number of cases now where the Treasury is ready to go ahead and construct public buildings * * *, but is unable to do so because appeals have been taken from the compensation awards and final judgment has thus been postponed * * * this proposed measure affords, in my opinion, the most important step that can be taken to expedite construction. [H. Rep. No. 2086, p. 2, S. Rep. No. 1325, p. 2, 71st Cong., 3d Sess.]

The committee report, recommending to the House of Representatives passage of the bill, stated:

Operation under this measure will result in no hardship on the owners of property taken by the Government. Their rights are amply protected thereunder. By this bill it is sought merely to provide a means whereby the Government may take title immediately, and leave the amount of compensation to be determined by the court according to the usual procedure. [H. Rep. No. 2086, *supra*, 1.]

The chairman of the Judiciary Committee stated to the House in debate that the measure—

does not change the procedure so far as the jurisdiction or right to take over in condemnation proceedings is concerned.

Wherever the United States rightfully and properly is taking condemnation proceedings under Federal statutes, then there is inserted this provision, that in such case the Government may take title at once by paying the money into court. [74 Cong. Rec. 778.]

It was recognized that acquisition of title by the Government was usually delayed by determination of the issue of just compensation. The effect of the 1931 statute is to eliminate that cause of delay.

The act itself provides for the vesting of title in the United States, and this occurred in the present case when the declaration was filed and the estimated just compensation was deposited. Accordingly, the judgment, entered after the United States obtained title by virtue of the statute, did not confer title. Even if, as petitioner requested (R. 25-26), the judgment had been vacated, no divesting of title would have occurred. The effect of the judgment was (1) to declare that title had passed to the United States and (2) to fix the time within which and the terms upon which possession of the land should be surrendered to the United States.

Petitioner concedes (Pet. 14) the validity of so much of the judgment as gives the Government possession of the condemned land. Equally it would seem that the remaining portion of the judgment was authorized: since the statute expressly empowered the District Court to enter an order giving the United States possession of the land, it was clearly

appropriate in connection with that order to enter a judgment reciting that, as the act also provides, title has passed to the United States. Such a judgment can be recorded and thus afford notice that the United States has become owner of the land in question. As the Circuit Court of Appeals stated:

* * * The statute * * * declares that upon the performance of certain requirements the condemnation shall be effective. The judgment of the [trial] court here merely recites that it has found that these requirements have been met. * * * the court is required to fix the time and the terms upon which defendant shall surrender possession, which all implies that the court must first express its judgment, that the requirements of the statute have been complied with. * * * To advise the * * * [petitioner] of the action that has been taken certainly does not adversely affect the enforcement of its rights. [R. 60.]

The contention of petitioner that the judgment of the District Court exceeded its statutory authority would have substance only if entry of the judgment foreclosed petitioner in respect of some issue that it is entitled to raise in the proceeding. Cf. *Windsor v. McVeigh*, 93 U. S. 274, 277. Petitioner necessarily admits (Pet. 2) that it is not precluded as to the issue of just compensation. But it argues that entry of the judgment constitutes a disposition of all other issues of the case (Pet. 2, 4, 14) and consequently prevents it from establish-

ing, if possible, that the Government is not entitled to condemn the property.

There is no warrant for ascribing this effect to the judgment and therefore no basis for petitioner's argument. Petitioner's rights were not affected by entry of the judgment. As we have pointed out (*supra*, page 10), the judgment did not confer title on the United States. Nor did it cut off adversary judicial inquiry into the validity of the taking; section 1 of the Declaration of Taking Act is premised upon a valid condemnation proceeding. In the words of the Chairman of the House of Representatives Committee on the Judiciary, quoted above at page 10:

* * * Wherever the United States *rightfully and properly* is taking condemnation proceedings under Federal statutes, then there is inserted this provision, that *in such case* the Government may take title at once by paying the money into court. [Italics supplied.]

In other words, title passes only if the United States has power in the particular case to take title. Thus, despite the declaration of taking and judgment on the declaration, the defendant in eminent domain will have full opportunity to urge any defenses to the suit that it may raise in its answer to the complaint in condemnation. These defenses will be passed upon before the amount of just compensation is determined; and, as both

courts below made plain (R. 35, 59), if the defendant establishes that the complaint must be dismissed, the declaration will fail.⁵

In this view of the case, the judgment complained of raises no question under the Fifth Amendment, as contended by petitioner (Pet. 4), since the judgment did not deprive the petitioner of any property and did not foreclose subsequent defense by petitioner to the suit on any ground. Cf. *Windsor v. McVeigh*, *supra*.

Petitioner's contention (Pet. 4) that the District Court's entry of judgment *ex parte* in the present case runs contrary to the mandate of the federal conformity statutes⁶ is likewise founded on the assumption that the judgment determined all is-

⁵ Preservation of whatever defenses to a taking which an owner may have is not inconsistent with the Declaration of Taking Act and does not impair its utility. Only in rare instances is there any question of the power to condemn. As a result, it is ordinarily certain that the United States will ultimately obtain title. In the usual case, the acquiring authority may, in order to expedite the construction of public works, file a declaration of taking and thus secure title before final judgment. In the unusual case, where there is doubt of the constitutional power or of the statutory authority to condemn, it is unlikely that a declaration, which may turn out to have been futile, will be filed.

⁶ Petitioner in its brief in the Circuit Court of Appeals cited section 914 of the Revised Statutes (U. S. C., title 28, sec. 724), section 2 of the Act of August 1, 1888, c. 728, 25 Stat. 357 (U. S. C., title 40, sec. 258), and section 1 of the Act of August 18, 1890, c. 797, 26 Stat. 316, as amended (U. S. C., title 50, sec. 171) (Br. 15). These statutes have not been superseded with respect to condemnation trials by the Federal Rules of Civil Procedure. Rule 81 (a) (7).

sues in the condemnation proceeding except that concerning compensation (see Pet. 2, 4; C. C. A. Br. 17-18). The Circuit Court of Appeals held (R. 64-65) that the procedure followed by the District Court, when its nature and effect are correctly viewed, conformed to the requirements of the California practice.⁷

We think it clear, then, that petitioner has no ground to complain of the judgment entered by the District Court on January 15, 1941, and should now be required, as the courts below have held, to answer on the merits the Government's complaint in condemnation.

CONCLUSION

The decision of the Circuit Court of Appeals is plainly right; it presents no conflict, as alleged (Pet. 5), with a decision of this Court. The question raised by petitioner is insubstantial, and does not call for further review either as a question of general importance or as disclosing such a departure by the federal courts from the usual and accepted course of judicial proceedings as to require

⁷ In the event of any inconsistency between state procedure and the provisions of a federal statute, the latter, of course, are controlling. *Luxton v. North River Bridge Co.*, 147 U. S. 337. In consequence, the Declaration of Taking Act herein must prevail in the case of any conflict between California procedure and that followed by the District Court, which, as we have pointed out (*supra*, pages 10-13), was authorized by the federal act.

this Court's supervision. It is therefore respectfully submitted that the petition should be denied.

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April 1942.